

**IN THE COURT OF COMMON PLEAS OF BEAVER COUNTY,  
PENNSYLVANIA  
CRIMINAL DIVISION**

<b>In Re:</b>	}	
	}	
<b>PACE-O-MATIC, INC. EQUIPMENT</b>	}	<b>No. M.D. 965-2013</b>
<b>TERMINAL I.D. NO. 14263</b>		

**RESPONSE TO THE COMMONWEALTH'S MEMORANDUM OF  
LAW IN OPPOSITION TO RETURN OF SEIZED PROPERTY**

AND NOW, comes the Petitioner, PACE-O-MATIC, by and through its attorney, WAYNE V. DELUCA, ESQUIRE, and files this *Response to the Commonwealth's Memorandum of Law in Opposition to Return of Seized Property*.

**PROCEDURAL HISTORY**

On November 19, 2013, the Pennsylvania Bureau of Liquor Control Enforcement entered the American-Italian Club in Aliquippa, PA, and seized a Pace-O-Matic, Inc., Pennsylvania Skill Game (hereafter "game"), Terminal I.D. #142613. On January 6, 2014, Pace-O-Matic filed a *Petition for Return of Seized Property*, at M.D. 965-2013.

On September 26, 2014, a Return of Property Hearing was held before Judge Harry E. Knafelc.<sup>1</sup> Both parties agreed that the *only* issue to be determined by the Court was whether the game was predominately one of skill or of chance. (HT 4) Testimony was presented that addressed this issue.

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<sup>1</sup> References to the Hearing Transcript will appear as "HT \_\_\_\_."

At the conclusion of the hearing, Pace-O-Matic submitted a *Memorandum of Law In Support of Petition for Return of Seized Property*. (HT 119) The Commonwealth was permitted time to file a response to that memorandum, and Pace-O-Matic was thereafter given one (1) week from receipt of the Commonwealth's memorandum to file any response. (HT 118-119).

On November 25, 2014, the Commonwealth filed its *Memorandum of Law in Opposition to Petition for Return of Seized Property*. Upon request, Pace-O-Matic was granted an extension of time until December 12, 2014 to file its Response.

This responsive memorandum filed on behalf of Pace-o-Matic follows.

### **STATEMENT OF THE FACTS**

Three witnesses testified at the hearing on return of seized property. The Commonwealth presented Michael Cruz, ("Cruz"), the Chief Technology Officer with the Pennsylvania Gaming Control Board. Cruz evaluated the game and its Source Code, and prepared a report in preparation for the hearing. (HT 11-12, 18-19) The report, entitled "*Gaming Lab Analysis of Pace-O-Matic Device*," and dated September 3, 2014, was offered into evidence as "Commonwealth's Exhibit 1." (HT 21-22)(hereafter, "Ex. 1 at \_\_\_\_"). Therein, Cruz determined, based on his skill and experience, that the game was predominately one of chance. (HT 22; Ex. 1 at 11) However, Cruz had never before been asked to review whether a tabletop game was predominantly one of skill or chance, and had never testified as an expert in precisely that capacity. (HT 14) His expertise involves insuring that slot machines and gaming devices intended for use within

Pennsylvania casinos are operating according to the regulations set forth by statute. (HT 13-14)

Pace-O-Matic offered the testimony of two (2) witnesses. First, they offered Michael Pace (“Pace”), the owner, chairman, president, Chief Executive Officer and hardware and software designer for Pace-O-Matic. (HT 68) Pace designed and redesigned the game so that it would be predominately one of skill and thereby legal in Pennsylvania. (HT 70, 82) Next, Pace-O-Matic offered the testimony of Nick Farley (“Farley”), the owner and operator of Nick Farley & Associates, which tests and evaluates electronic gaming devices to insure regulatory compliance in various jurisdictions throughout the country. (HT 93-94) Additionally, Farley offers expert testimony and legal opinions regarding unclassified games. (HT 94) In that capacity, Farley evaluated the game and the Source Code and prepared a report dated March 25, 2014, which was moved into evidence as exhibit P-2. (HT 106)(hereafter “P-2 at \_\_\_\_”). In that report, Farley concluded in his expert opinion that the game is predominantly a skill game. (HT 105; P-2 at 8-9)

Both Cruz and Farley evaluated the game to determine whether it was predominately a game of skill or of chance. (HT 22, 98; Ex. 1; P-2) Farley testified that a predominately skill game requires that the player makes determinations that affect the outcome of the game. (HT 99)

The game is activated by inserting money into the JCM bill validator. (HT 23, 76) A player receives a credit for every cent inserted; e.g., one (\$1.00) dollar equals 100 credits. (HT 24) The game is then ready for play. (HT 25)

The first game, or the base game, is a tic-tac-toe, three-by-three matrix. A random number generator (“RNG”) creates a puzzle which is presented to the player as symbols and various line wins. (HT 31, 55, 83, 99).<sup>2</sup> The player can select to play this base game in one of three themes: 1) Bombs and Bombshells; 2) Pirates Prize; or 3) Cocktail Cove. (P-2 at 2) The game is created with certain rules so that when it presents a puzzle at random from millions of viable puzzles, it will never present a puzzle that is already solved. (HT 74, 100; Ex. 1 at 5; P-2 at 2) In other words, the player cannot automatically win by activating the game and generating a puzzle with three matching symbols in a row, as that would be predominantly a game of chance. (HT 74, 100) Rather, it is a game of skill because the randomly presented puzzle is presented unsolved and it requires the player to exercise skill to continue. (HT 74, 100; P-2 at 8-9).

The player must determine how much he wants to wager. (HT 55) Next, the player must determine whether to play the wild card, and if he plays it, he decides where to place it on the grid. (HT 29-30, 35, 55, 84, 92, 100) Additionally, the screen displays a “next screen” button, which gives the player the ability to go to the next puzzle without wagering additional credits. (HT 56, 76-77; Ex. 1 at 2; P-2 at 2) The player then has roughly ten (10) seconds to observe the puzzle on the next screen and to decide if he wants to play that next puzzle, or to cash out and quit playing. (HT 56-57, 76-77, 101-102) The player must also review the puzzle to determine the best slot on the grid to place the wild card to achieve the highest win, by observing the symbols and analyzing

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<sup>2</sup> Noteworthy is that Cruz admitted the RNG in this game is *not* the same as the RNG within a slot machine, because slot machines operate in a different fashion. (HT 31) Moreover, Pace stated that the RNG within the game is necessary to allow the player to utilize skill to play the game, because the RNG allows you to move around the screen in a random pattern, rather than repeating one pattern, over and over. (HT 71)

all the potential outcomes. (HT 78-79, 100-101, 112-113) Ultimately, the player has the ability to review the initial screen, the next screen, and then to determine whether to continue playing *or* to cash out after viewing the puzzle and *after* wagering if he feels there isn't a good "win." (HT 79)

A bonus round is achieved by getting three specific like symbols in a row. (HT 33, 104, 113) In the bonus round, the player utilizes hand-to-eye coordination to shoot the symbols, depending on the theme initially selected. (HT 53, 105) The bonus game requires manual dexterity, and is completely a game of skill. (HT 53-54, 105; P-2 at 8) There is no "chance" element involved within the bonus round. (HT 105)

The RNG is important to this aspect of the game because it insures that the symbols will move at different velocities, and appear at different places on the screen, during each bonus round. (HT 80) Whereas, without the RNG, the symbol would appear in the same spot, at the same speed, during every bonus round, thus eliminating the skill element from the game. (HT 80)

A "Follow Me" feature is offered to give the player an opportunity to win 104% of the original wager, in each and every game he plays, despite the RNG. (HT 36, 85) Specifically, if the tic-tac-toe feature awarded an amount *less than* the player wagered, then the game automatically offers this "Follow Me" feature, at no additional cost to the player, to offer that player the chance to win 104% of that initial wager. (HT 36, 48-49, 86, 103; Ex. 1 at 2; P-2 at 3) The player is not required to wager additional credits or to feed the game more money into the bill validator to play this "Follow Me" feature. (HT 48-49, 104)

Both Cruz and Farley likened this “Follow Me” feature to the “Simon Says” electronic game produced in the 1980’s, because it flashes a pattern and a tone, which the player must mimic to continue onward. (HT 40; P-2 at 3-4, 8) If the player can continue through a series of 40 “Follow Me” patterns, then the player receives 104% of his initial wager. (HT 41) The “Follow Me” feature is a memory game, utilizing cognitive skill. (HT 49) The “Follow Me” feature does not involve any chance whatsoever, and is completely dependent upon skill, because the RNG creates a unique pattern each time. (HT 49, 86) Moreover, both Cruz and Farley stated that they each had staff members who successfully completed the “follow me” patterns. (HT 44, 104, 109) Clearly, this game is purely one of skill. (HT 44, 103)

Of the three (3) games available to the player, Cruz agreed that both the bonus round and the “Follow Me” feature are games of skill. (HT 49, 53-54) The bonus round requires manual dexterity to line-up a cannon and shoot the symbols, and the “Follow Me” feature requires cognitive skill. (HT 49, 53-54, 58) Neither of those two (2) games involves chance. (HT 54)

Although Cruz concluded that the game was predominately one of chance, he stated that it could not be placed in a Pennsylvania casino because it does not meet the statutory requirements for a game of chance. (HT 47, 66)

## **ARGUMENT**

### **I. PACE-O-MATIC IS ENTITLED TO RETURN OF THE SEIZED GAME**

The Pennsylvania Bureau of Liquor Control Enforcement seized Pace-O-Matic's game from the Italian-American Club in Aliquippa, PA., concluding that the game was a gambling device. 18 Pa.C.S. § 5513(a)(1) . The statute reads:

**§ 5513. Gambling devices, gambling, etc.**

**(a) Offense defined.**—A person is guilty of a misdemeanor of the first degree if he:

(1) intentionally or knowingly makes, assembles, sets up, maintains, sells, lends, leases, gives away, or offers for sale, loan, lease or gift, any punch board, drawing card, slot machine or any device to be used for gambling purposes, except playing cards.

....

18 Pa.C.S.A. §5513(a)(1).

Pace-O-Matic established at the hearing, through testimony and the offer of evidence, that the game is *not* a gambling device. Pace-O-Matic is entitled to the return of the seized game.

**A. BURDEN OF PROOF AT THE HEARING ON PETITION FOR RETURN OF SEIZED PROPERTY**

Pace-O-Matic filed a *Petition for Return of Seized Property* pursuant to Pennsylvania Rule of Criminal Procedure 588, and requested that the Court hold a hearing on that motion. The rule states:

**Rule 588. Motion For Return of Property**

(A) A person aggrieved by a search and seizure, whether or not executed pursuant to a warrant, may move for the return of the property on the ground that he or she is entitled to lawful possession thereof. Such motion shall be filed in the court of common pleas for the judicial district in which the property was seized.

(B) The judge hearing such motion shall receive evidence on any issue of fact necessary to the decision thereon. *If the motion is granted, the property shall be restored unless the court determines that such property is contraband, in which case the court may order the property to be forfeited.*

Pa.R.Crim.P. Rule 588. (*emphasis added*)

At the hearing, both parties agreed that the initial burden was on Pace-O-Matic to establish by a preponderance of the evidence that it had entitlement to lawful possession of the game. (HT 6) *Commonwealth v. Wolfgang*, 97 A.3d 1274, 279 (Pa.Cmwlth. 2014); *Singleton v. Johnson*, 929 A.2d 1224, 1227 (Pa.Cmwlth. 2007). After entitlement to lawful possession is established, the parties agreed that the burden shifts to the Commonwealth to establish by a preponderance of the evidence that the seized property is contraband. *Commonwealth v. Janda*, 14 A.3d 147, 166-167 (Pa.Super. 2011).

The *Singleton* court stated:

Motions to secure the return of property seized by police are filed pursuant to Pa. R.Crim. P. 588. Under this rule, on any motion for return of property, the moving party must establish by a preponderance of the evidence entitlement to lawful possession. Once that is established, unless there is countervailing evidence to defeat the claim, the moving party is entitled to the return of the identified property. A claim for return of property can be defeated in two ways: an opposing party can establish that it, not the moving party, is entitled to lawful possession to the property or the Commonwealth can seek forfeiture claiming that property for which return is sought is derivative contraband. *Commonwealth v. Crespo*, 884 A.2d 960 (Pa.Cmwlth.2005).

*Singleton v. Johnson*, 929 A.2d at 1227.

1. **Pace-O-Matic Met It's Burden and Established Entitlement to Lawful Possession**

In its *Memorandum in Opposition*, the Commonwealth states that Pace-O-Matic failed to establish entitlement to lawful possession of the game under Rule 588(a).

(*Memorandum in Opposition* at 2) While characterized as an argument, this is nothing more than a declaratory statement lacking any support by reference to the transcript or caselaw. The fact is, Pace-o-Matic's ownership or possessory interest in the game was uncontested during the hearing. Moreover, the Commonwealth has not advanced an actual argument within its *Memorandum in Opposition* which *disputes* Pace-O-Matic's ownership or possessory interest in the game. Regardless, Pace-O-Matic will respond.

Prior to Pace offering testimony, the Commonwealth conceded Pace-O-Matic's proprietary rights in the Source Code, which is the heart of the game. In fact, the Commonwealth made a point of informing the court at the beginning of the hearing, prior to calling any witnesses, that the Source Code and any information copied to disk or recreated by the Commonwealth while evaluating the game had to be protected and returned to Pace-O-Matic because it constituted Pace-O-Matic's proprietary information. (HT 4-5) To the Commonwealth's credit, it agreed that the information should be submitted to the Court under seal for purposes of ruling on the underlying pending motion, and then had to be returned to Pace-O-Matic. (HT 4-5) Thus, Pace-O-Matic points out that there was never even any question as to its ownership and entitlement to lawful possession of the game. To the extent that any question remained, Pace-O-Matic met its burden through the testimony of Pace.

Pace testified that he was the owner, operator, president and CEO of Pace-O-Matic. (HT 68) Pace designs the hardware and software for the company. (HT 68) In that capacity, he built, designed and revamped the game in question, and he did so specifically to meet Pennsylvania's legal standards for a game of skill. (HT 70-71) The game presented for the court's evaluation and review, along with the Source Code, belongs to Pace-O-Matic, which is Pace's company. (HT 4-5, 70-71) Pace, as owner, operator, president and CEO of Pace-O-Matic, established entitlement to lawful possession of the game through his testimony at the hearing. Consequently, Pace-O-Matic satisfied their initial burden, thereby shifting the burden to the Commonwealth to defeat the request for return of property.

**2. The Commonwealth Failed to Establish by a Preponderance of the Evidence that the Game is Contraband**

After Pace-O-Matic established entitlement to lawful possession, the burden shifted to the Commonwealth to establish by a preponderance of the evidence that the game is contraband. (HT 6); *Commonwealth v. Janda*, 14 A.3d 147, 166-167 (Pa.Super. 2011). It is undisputed that under Pennsylvania law the three elements of gambling are: "(1) consideration; (2) a result determined by chance rather than skill; and (3) reward." *Commonwealth v. Irwin*, 636 A.2d 1106, 1107 (Pa. 1993), citing *Commonwealth v. Twelve Video Poker Machines*, 537 A.2d 812, 813 (1988). When all three of these elements are present, the machine will be "so intrinsically connected with gambling" as to be a gambling device *per se*. *Commonwealth v. Two Electronic Poker Game Machines*,

465 A.2d 973, 977 (1983); *See Commonwealth's Motion in Opposition* at 3, citing *Commonwealth v. Weisman*, 479 A.2d 1063, 1065 (Pa.Super. 1984).

At the hearing, Pace-O-Matic stipulated that the game satisfies two (2) of those three (3) factors: consideration and a reward. Players must insert money to play the game, which is “consideration.” (HT 23, 76) If a player wins the game, he is rewarded with a ticket that can be exchanged for merchandise or cash, which is a “reward.” (HT 36) The only factor left to debate at the hearing was whether the result is determined by chance or skill. In order to prevail, the Commonwealth had the burden of establishing, by a preponderance of the evidence, that the game is predominately one of chance.

### **The Predominate Factor Test**

The parties agree that the appropriate test to be applied is the predominate factor test. (HT 3-4); (*Memorandum in Opposition* at 3). The Commonwealth was required to meet its burden by applying the predominate factor test. That is to say, the Commonwealth was obligated to establish that the game is predominately chance.

In *Commonwealth v. Dent*, 992 A.2d 190, 193 (Pa.Super. 2010), the Superior Court cited *Two Electronic Poker Game Machines, supra*, and adopted the predominate factor test first announced by the Pennsylvania Supreme Court. The *Dent* Court *reiterated* that “the Supreme Court ... set forth the ‘predominate-factor test’ which holds that for a game to constitute gambling, it must be a game where chance predominates rather than skill.” *Commonwealth v Dent*, 992 A.2d at 193. “The Supreme Court stated that, in making this determination, the court should determine the relative amount of

chance and skill present in the game; and if the element of chance predominates, the game is a gambling game.” *Id.* (internal citations omitted)

In its *Memorandum in Opposition*, the Commonwealth attempted to meet its burden by making two arguments. First, the Commonwealth highlighted the fact that the game contains a random number generator (RNG). Secondly, although the Commonwealth essentially concedes that the game requires skill, it contends that the game doesn’t require some arbitrary level of skill that meets the Commonwealth’s satisfaction. Particularly, the Commonwealth expresses that the base level game requires too little skill, and that the “Follow Me” game requires too much skill. Neither of the Commonwealth’s arguments establish by a preponderance of the evidence that the game is predominately one of chance.

**a) The Random Number Generator (RNG) Does Not Automatically Establish That The Game is Predominately One of Chance**

The Commonwealth attempts to make much of the fact that the game mechanism contains a random number generator (RNG). (*Memorandum in Opposition* at 3-4, 7) In fact, the Commonwealth focuses on the initial, base, game to satisfy its burden by arguing that the RNG creates the puzzles randomly in the background and then presents them to the player. (*Memorandum in Opposition* at 7) This argument does not establish that the game is predominately chance.

Initially, Pace-O-Matic submits that the Commonwealth has not cited to any statute, nor any Pennsylvania case law, that supports the contention that a game

containing a RNG is automatically one of chance. The Commonwealth is unable to cite any authority to support its argument because there isn't any case law that states that a game containing a RNG is automatically considered a game of chance.

Noteworthy is the fact that the Commonwealth's own expert, Cruz, admitted that the RNG in this game is not the same as the RNG contained with a slot machine, because slot machines function differently. (HT 31) With respect to this particular game, Pace stated that the RNG is necessary to allow the player to utilize skill to interact and to play the game, as the RNG is what permits for the creation of random puzzles and for the various symbols to move around the screen in different patterns. Without the RNG, the player would see the same puzzle, or the same symbol location, over and over. (HT 71)

In truth, the RNG functions to insure that the game is predominately one of skill, rather than chance. With respect to the base level game, it insures that a *different* puzzle is presented to the player each time. The player must exercise skill to study the puzzle and interact with the game. Without the RNG, the same puzzle would appear each time, eliminating the need for a player to exercise skill.

With reference to the bonus game, the RNG insures that the symbols appear at varying velocities and at different locations on the screen. The player must use skill to lineup the cannon and shoot the symbols.<sup>3</sup> Without the RNG, the symbols would appear in the exact same spot on the screen, and the player wouldn't need any skill, or manual dexterity, to be successful when shooting at them.

Finally, with the "Follow Me" game, the RNG insures that the flashes and tones appear in a different sequence each time. A player must exercise skill to mimic this

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<sup>3</sup> Depending on which theme the player selects in the base level game, the bonus round will contain different symbols that match that particular theme. (P-2 at 4-6)

“Simon Says” type game. Without the RNG, the game would display the same sequence and tone each time, eliminating any need for skill. (HT 49, 86)

The existence of the RNG supports a conclusion that the game is predominately skill, rather than chance.

**b) The Predominate Factor Test Does Not Require A Qualified Level Of Skill**

The Commonwealth’s second argument concedes that the game requires skill, but implies that it’s not the appropriate amount of skill. At the outset, Pace-O-Matic argues that the predominate factor test only requires that the game be evaluated to determine if it’s mostly one of chance or mostly one of skill. *Dent, supra*. “Skill” or various levels of skill, are not further qualified, contrary to the Commonwealth’s suggestion.

Recognizing that the game is predominately skill, the Commonwealth tries to overcome this hurdle and attempts to meet its burden by stating that “it’s not the skill or want of skill of the player that determines whether a game is one of chance or skill. The question of whether a game is one of chance or one of skill is not to be tested by the standard of experts, or of any limited class of players, but by that of the average skill of the majority of players likely to use the machine.” (*Memorandum in Opposition at 5*) The Commonwealth does not cite any statute or Pennsylvania case law that supports the Commonwealth’s purported skill qualifications. The Commonwealth’s argument about the level of skill required, or the “class of players” to be considered, is not supported by the law. The predominate factor test does not qualify the level of skill, nor the class of players to be considered, and the Court should not employ such a standard when considering whether or not the Commonwealth has met its burden.

While conceding that some players might have the skill to influence the outcome of the game, the Commonwealth suggests that the “patronizing general public” does not possess enough skill. (*Memorandum in Opposition* at 5-6) This aspect of the Commonwealth’s argument falls short of satisfying the burden of proof for the very obvious reason that the Commonwealth did not offer any testimony or results from the “patronizing general public” to establish its proposition. To the contrary, the Commonwealth offered the testimony of an expert who informed the court that, in fact, members of his staff exercised adequate skill to affect the result of the game. (HT 44)

The Commonwealth is attempting to shift the burden back to Pace-O-Matic to offer additional proof that the “patronizing general public” has the skill to play the game. Again, this is not the predominate factor test. It is the Commonwealth’s burden to establish by a preponderance of the evidence that the game is predominately one of chance and, as such, properly seized contraband. Since it can’t meet this burden, it attempts to shift the burden back to Pace-O-Matic to prove some arbitrary level of skill. The burden does not shift back to Pace-O-Matic, as this Court well knows.

Pace-O-Matic submits that the game is predominately one of skill that requires the player to select between puzzles, to place a wild symbol in order to match three symbols, to exercise a level of manual dexterity to shoot symbols in the bonus round, and to imitate a series of flashes and tones in the “Follow Me” game. The Commonwealth cannot establish that this game is predominately one of chance. The Commonwealth has not satisfied its burden.

## **B. THE GAME IS PREDOMINATELY ONE OF SKILL**

1. **The Parties Agree That Two of the Games Are Purely Skill Games and Not Games of Chance**

As previously established, the parties agree that the only issue is whether this is a game predominately of skill or predominately of chance. (HT 4) The parties also agree that two (2) of the three (3) games have outcomes which rely solely on skill, and have nothing to do with chance. (HT 49, 53-54, 58)

Specifically, the bonus round relies on manual dexterity to line-up the cannon and shoot the symbols wherever they appear on the screen. Cruz agreed that this game is completely based on skill. (HT 53-54, 58 ) Moreover, the “Follow Me” round relies on a player’s memorization or cognitive skills. Again, Cruz agreed that this game is completely based on skill. (HT 49, 54 )

While not conceding that the base level, tic-tac-toe game was also a game of skill, Cruz opined that the player must touch the screen to place a wild card in order to match three symbols, even though this wasn’t overly difficult. (HT 59) Again, Pace-O-Matic submits that the predominate factor test does not qualify the level of skill necessary, but simply whether skill affects the outcome. Obviously, if a player has to place a wild symbol in order to create three in a row, then it is the player’s skill that affects the outcome. Consequently, all three (3) games require skill to affect the result.

2. **Cruz, the Commonwealth’s Expert, Testified That This Is Not A Game Of Chance That Could Be Placed In A Pennsylvania Casino**

An insightful and instructive piece of evidence came from an exchange between the Court and the Cruz, the Commonwealth's own expert witness who evaluated the game. While it was Cruz's position that the game is predominately one of chance, he testified that it did not meet the requirements of a gambling device that could be placed in a Pennsylvania casino. (HT 65-66) This proves, perhaps more clearly than any other bit of expert testimony, that the game is predominately one of skill. The Commonwealth's own expert from the Gaming Commission has concluded that this is not a game of chance that could be placed in a Pennsylvania casino.

The Court pursued this enlightening line of questioning during the hearing:

THE COURT: I have one question, maybe two questions. If it's a game of chance, then it's permitted into the casino.

[CRUZ]: If it passes, there's a lot of other steps...

THE COURT: Yeah.

[CRUZ]: -- but one of them is, is it predominantly a game of chance.

THE COURT: A game of chance?

[CRUZ]: Yes.

THE COURT: And this is a game of chance, predominantly a game of chance according to your testimony?

[CRUZ]: That is, yes, my opinion.

THE COURT: If it's not a game of chance, then it's not permitted into the casinos, right, if it's a game of skill, then it's not considered a slot machine or a game of chance?

[CRUZ]: Yeah, it's not considered a game of, it's not considered a slot machine, but you know, we have other rules. You know, it could be perhaps, you know, an electronic gaming table where, you know,

it's not a game of chance because you're playing with cards.

THE COURT: Taking all of the other factors out of consideration, could this device be played in a casino, be placed in a casino?

[CRUZ]: No, because it would fail a number of –

THE COURT: No. Take all of the other factors, eliminate all of those other factors, would that device be eligible to be placed in a casino?

[CRUZ]: You mean all of the ancillary –

THE COURT: Right. All the, take all of the other stuff out.

[CRUZ]: I mean an argument could be made, yes, because –

THE COURT: No, no. You make a determination. I don't need an argument. I want to know yes or no.

[CRUZ]: It's hard to separate all of those ancillary pieces –

THE COURT: Very well.

[CRUZ]: -- because obviously if you look at the statute that defines slot machine, it is very broad.

THE COURT: Very well.

[CRUZ]: It says an electronic contrivance by way of skill or chance, I'm paraphrasing –

THE COURT: I understand.

[CRUZ]: --but you know, you can make the argument, but.

THE COURT: Very well.

(HT 65-67) What is striking about this exchange is that the Commonwealth's expert, Cruz, determined that the game was predominately one of chance and penned a report to that effect which the Commonwealth offered into evidence. (Ex. 1) However, Cruz stated that this game predominately of chance could not be placed in a Pennsylvania

casino, but then hedged in his response, indicating that “an argument could be made....” (HT 65-66)

Pace-O-Matic argues that this speaks volumes about the true nature of this game. It does not qualify as a gambling device, and it is not predominately one of chance, such as those you would find in a Pennsylvania casino.

3. **The Game Was Specifically Designed To Be Predominately A Games of Skill**

Pace specifically requested the applicable Pennsylvania statutes, and engaged the assistance of knowledgeable legal counsel, in order to design a legal game that could be placed in various establishments in compliance with Pennsylvania laws. (HT 69-70) To that end, Pace developed an initial design, had it evaluated, and made necessary changes in order to develop a legal game of skill. (HT 69-71) Understanding that player interaction and skill were prerequisites, Pace developed the game in question which Pace-O-Matic submits is predominately a game of skill.

The Commonwealth’s own expert essentially concedes that the bonus round and the “Follow Me” round require skill to affect the result. (HT 49, 53-54, 58) For this reason, Pace-O-Matic will focus on the skill required in the base level game.

**The Base Level Game**

When a player approaches the game, the initial game offered is the so-called “tic-tac-toe” game. This base level game was developed to insure the player would exercise

skill over the result. Initially, the player has the ability to see the puzzle he will be required to solve, *without having to commit any wager of money*. (Ex. 1 at 3; P-2 at 2-3) If the player observes that game and doesn't like it for whatever reason, he has the ability to hit the "next screen" button and view the next puzzle. If he doesn't like that puzzle, he can hit "next screen" again, and view a third puzzle. The player can do this a total of eight (8) times for each of the three themes of the "tic-tac-toe" game. Conceivably, a player could review an aggregate 24 puzzles without ever committing a wager. Most importantly, if that player decides he doesn't like any of those 24 puzzles, he can walk away.

Pace-O-Matic asks the Court to consider the above example and compare it to a basic slot machine. Whether that slot machine is the more traditional reels that display bells and cherries, or the more animated video-type slots, in either case the player *must* commit a wager before spinning the reels or activating the game. The player does not get to "peek" at the puzzle or resulting reels first, and *then* have the opportunity to commit the wager. In the most basic explanation, this is what makes the slot machine purely a game of chance. The player inserts money and makes a wager without any idea what will be displayed on the reels or the screen. The object is that the spin will automatically reveal a winning combination. By comparison, the game in question completely *removed* this element of chance by allowing the player to peek ahead and see the puzzle he will play before he commits to playing.

The other glaring difference between a slot machine and this game, is that a person playing the slot machine hopes that the spin of the reels/video will produce an automatic win. (i.e., matching symbols in a row on a played line) In contrast, the game

in question is programmed to remove that chance of an automatic win, entirely. Thus, the only way to produce a win is for the player to interact with the game, place the wild card on the screen, and attempt to match three symbols. There is zero chance that simply hitting the “next screen” button will reveal a puzzle that is already solved and already a winner.<sup>4</sup>

The skill element involves: 1) deciding whether or not to play the game after previewing the puzzle(s); 2) determining how many credits to play; 3) analyzing the puzzle to determine what will produce the greatest win; and 4) placing the wild card somewhere on the screen. Obviously, the player also controls his own ability to determine whether to play another puzzle or to cash out. The base level game is a skill game.

## **CONCLUSION**

**WHEREFORE**, Pace-O-Matic submits that the Commonwealth failed to establish by a preponderance of the evidence that the Pennsylvania Skill Game is predominately one of chance. The facts established at the hearing support a conclusion

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<sup>4</sup>This base level game is very similar to the extremely popular electronic game “Candy Crush” which is also not an illegal game of chance. Just as in the base level “tic-tac-toe” game, the game of “Candy Crush” displays a grid of candy pieces and the player must interact with the game to align at least three matching pieces of candy. “Candy Crush” never presents a game where there are already similar pieces aligned three-in-a-row. It requires player skill to match the candy, just as this game requires skill.

that the Pennsylvania Skill Game is predominately a game of skill. The game is not contraband, and TERMINAL I.D. #14263, and any cash seized therewith, should be returned to Pace-O-Matic.

Respectfully Submitted,

Date: \_\_\_\_\_

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